No. 11-892

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARAMOUNT PEST CONTROL SERVICE, a Corporation, *Appellant*

vs.

CHARLES P. BREWER, individually and doing business as Brewer's Pest Control, ROSALIE BREWER, his wife, RAYMOND RIGHTMIRE, CARL DUNCAN, EARL MERRIOTT and all other persons associated with said appellees, *Appellees*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

APPELLANT'S OPENING BRIEF

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ABBREVIATIONS

1. Numbers without other designation refer to pages in the "Transcript of Record."
2. Appelle Charles P. Brewer is referred to as "Brewer" and his wife as Rosalie Brewer.
3. A full citation of authorities is contained in the Table of Authorities.

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STATEMENT OF JURISDICTION

This is an appeal from the District Court's refusal to grant appellant an injunction against former employes to prevent their taking appellant's business and the Court's refusal to award damages caused by these employes.

1. Appellant made allegations of "Diversity of Citizenship" (2). Exhibit 3 proved appellant a California corporation, authorized to do business

in Oregon since August 25, 1947 (117-8). The answer of appellees admits the allegations of diversity (2, 68) and jointly and severally alleges the appellees' citizenship in Oregon (69). There was undenied proof of such diversity (264, 414, 434, 440).

2. A claim was made in the complaint for the amount of $15,169.79 (21-25). With credits subsequently allowed, this was reduced to $12,950.00 (372-388). Appellant recovered nothing (77). Such claims and denial thereof provided jurisdiction both in the trial and appellate courts. *Hilton v. Dickinson,* 108 U. S. 165, 175.

3. The District Court had jurisdiction of this suit of a civil nature in equity, exceeding, exclusive of interests and costs, the sum of $3,000.00, as between citizens of different states. *28 U. S. C. A. §41 (1).*

4. This Circuit Court of Appeals has jurisdiction over the District Court of Oregon *(28 U.S.C.A. § 211)* and of this appeal from a final judgment thereof. *(28 U. S. C. A. § 225).*

STATEMENT OF CASE

The pest control service was separately started by T. C. Sibert in 1927 (114) and G. H. Fisher in 1935 (399) and consolidated in a partnership in 1938 (172) and brought to Oregon in July, 1942 (115) with a new idea in chemicals (116). They worked long hours, trained employes (115-6, 125), manufactured their poisons (Ex. 5 (1) to 5 (26);

118, 123), some unique (124, 174, 187-201), employed an entomologist (124, 185) who is extremely efficient (184-205), spent lots of money (166) which was invested in the business (167), and invented formulae to get a particular product to do a certain job against a specific pest (125, 174). Some of the formulae were furnished Brewer (176) and Duncan (175) when necessary to do their work in an efficient professional way (169). It owns its own building (173) and does business in four states (126).

Brewer applied for employment in January, 1946 (135, 142) without previous experience (135). He trained from February to April and was further instructed in Oregon under Duncan (Ex. 22, Ex. 51; 140). In April he was given a Branch Manager appointment (144), groomed for the Oregon territory (177) and trained by Duncan, Hilts (178) and Fisher (178) and in February, 1946, given copies of the Managers and Sales Agents Agreements (401) which were read (144-6), explained to him and approved by him (370, 401). He was ready to assume active service. The Sales Agents Agreement, also herein called franchise, was mailed to him two days before he signed it in July, 1946 (144).

From July, 1946, to September 12, 1946, the franchise was in full effect, including its Section 5 (147, 210). In September, at Brewer's request and for his reasons (181), Section 5 alone of the franchise was changed with respect to payment, to the effect that if Brewer took any money for himself,

an equal amount was to be paid Paramount (147, 181, 307), which was effective until December 31, 1946 (155). This for brevity is called "the dollar for dollar basis" and is admitted by Brewer (475). For emphasis, we repeat no other section of this franchise was ever changed. However, in October, he received an accounting on the original Section 5 basis and paid it without objection (211).

From January to March 1, 1947, the original franchise was again in full effect and Brewer made three voluntary payments thereon after a conference with Hilts (214) in accordance with the original Section 5 (214-217) (Ex. 57 to 61, Ex. 30 to 35). He admits recognizing the original franchise and making these three voluntary payments (303-4). Rosalie Brewer sent the February, 1947 payment and apologized for not sending it in full (Ex. 81) although she testified she did not know Paramount was asking for money (449).

In March, 1947, compensating for developing the Eastern Oregon territory, Paramount again voluntarily (155-6) changed the amount of payments under Section 5 to the "dollar for dollar" basis effective from January 1st to March 1, 1947 (Ex. 29; 257). This was done by Hilt's letter of March 15, 1947 (157; Ex. 29).

To satisfy Brewer and because relations were so friendly on June 17, 1947, both parties agreed to put the whole fiscal year from July 1, 1946 to June 30, 1947 on the "dollar for dollar" basis (238). From

July 1, 1947, Brewer was again on the original franchise at his own suggestion (161, 261).

On July 24, 1947, Brewer attempted to resign, effective August 1, 1947, in violation of a 90-day notice requirement in his franchise (163, 308, 308-9). He had given no notice of dissatisfaction (164, 403, 342, 405) and attempted to excuse his action at one time because of "his family" (165) and at another time because he was not on an equal share basis (306).

Fifteen days before his resignation, he made a part payment on his admitted obligation (310; Ex. 36) and 23 days later took the company's property, all its bank balance, its employees, and on August 1, 1947 started serving the same customers of appellant which he and his associates knew were under contract for service with Paramount. In the next few weeks appellees admit taking over 142 of their former employer's customers into their own business (47-50). This was in violation of Brewer's (39, ¶ 31) and Rightmire's (12 (b)) contracts not to solicit or go into the pest control business respectively, for a period of three years after termination of employment. Employees not under contract knowingly joined with those who were, to take Paramount Pest Control business into that of Brewer Pest Control, for which they now all worked (54, 248, 252). This condition gave rise to this litigation.

ERROR NO. 1—DOING BUSINESS IN OREGON

SPECIFICATION. Appellant cites as error the Court's failure to make a finding on a material issue created by the allegations in its complaint describing its business (4) and appellees answer that appellant was not "engaged in the business described, in the State of Oregon" (68 (2) (b)).

ARGUMENT. The question is one of fact. To support appellant's prayer for permanent injunction, it was necessary to prove appellant was not acting *ultra vires* and was authorized to and doing such established business in Oregon.

Exhibit 1 is the California Articles of Incorporation, Exhibit 2 is its declaration to so engage in Oregon, Exhibit 3 is the Oregon Corporation Commissioner's Certificate of Authorization to do such business in said state and Exhibit 4 is the receipt for fees to June 30, 1948 (118).

Appellant trains men in its central office in California to apply chemicals, prepare bait and insert poisons in the right manner and amounts. This training was extensive and unique (117), performed under the more severe laws of California (126). Thereafter its trained men were sent to establish the same business in Oregon, Washington and Arizona (126). Such personnel included Brewer and Duncan (140) who were sent to Oregon (140-1) to do this business. The officials of appellant made periodical visits to Oregon territory (179, 208, 213, 405) and the entomologist in charge

of pests, poisons and processes gave information and instruction over the entire territory from the central office (119-201). Instructions and information were constantly circularized to all employes wherever located (127-133; Ex. 7-26).

The proof shows there was identity in Oregon, with appellant's corporate powers and purposes in California, the same executives operated in both states, the same employes were trained in California who operated in Oregon, with the exception of Merriott who was trained by a California trained man (434), the same poisons, ingredients and methods were used and the one entomologist supervised the work in both states. There was not even a suggestion of evidence by appellees to support their issue that the two businesses were not the same.

Under such a record, appellant had a reasonable expectation the trial court would enter a finding in its favor on this issue. This was the business the court was asked to protect by injunction if other rights entitled appellant thereto. No findings were made thereon as required. (F. R. C. P. 52-a)

ERROR NO. 2—CONSPIRACY

Specification. The gravamen of this suit was appellant's charge of appellees' conspiracy to (a) breach the valid written and subsisting *employment contracts* between appellant and (i) Brewer (29-40) and (ii) Rightmire (12), also (b) to seek and acquire the business of appellant in Oregon by interfering with and causing the breach of *service con-*

tracts between appellant and its many customers, and (c) intentionally causing destruction of appellant's business in Oregon. Appellees denied these charges. Material issues were so presented to the court which erred in not making specific findings and separate conclusions thereon (Rule 52-a) and in not deciding in favor of appellant.

Points and Authorities. 1. A conspiracy is a combination between two or more persons by concerted action to accomplish an unlawful purpose by lawful means or a lawful purpose by unlawful means. *Alaska SS. Co. v. Int'l. Longshoremen's Ass'n.*, 236 Fed. 964; *Spaulding et al v. Evenson et al*, 149 Fed. 913; *Heitkemper v. Central Labor Council*, 99 Or. 1; *Dowdell et al v. Carpy et al*, 129 Cal. 168.

2. Civil liability rests on proof of something done by one or more of the conspirators in furtherance of its object, which resulted in damage to complainant. The overt act and the damage are the gist of the civil action. *National Fireproofing Co. v. Masons Builders' Ass'n.*, 169 Fed. 259; *Motley, Green & Co. v. Detroit Steel & Spring Co. et al*, 161 Fed. 389; *Alder v. Fenton*, 16 L. Ed. 696.

3. Liability is established by proof of showing concerted action from which the natural inference arises that the unlawful act was in furtherance of a common design, intention and purpose. *Calcutt v. Gerig*, 271 Fed. 220.

4. Any person entering a conspiracy already formed is deemed a party to all acts committed by

other conspirators, if done with knowledge and in furtherance of the common design. *Jayne v. Loder,* 149 Fed. 21.

5. A conspiracy to cause a breach of contract is an unlawful one. *Hitchman Coal and Coke Co. v. Mitchell,* 245 U. S. 229; *Motley, Green & Co. v. Detroit Steel & Spring Co. et al,* 161 Fed. 389; *Sorenson v. Chevrolet Motor Co.,* 171 Minn. 260; *E. L. Husting Co. v. Coca Cola Co.,* 205 Wis. 356.

6. Repudiation is where one party to a contract refuses to perform the remaining obligations except on material modification. It must be a present, positive unequivocal refusal. *Jordan v. Madsen et al,* 69 Utah 112; *Holden & Marlin v. Gilfeater,* 78 Vt. 405; *Atkinson v. District Bond Co.,* 5 Cal. App. (2d) 738.

7. The renunciation of a contract by the promissor before the 90-day period stipulated for notice is not effective unless accepted by the promissee. *Peeler v. Tarola Motor Car Co.,* 170 Or. 600; 12 *Am. Jur.* "Contracts" § 448; p. 1030.

ARGUMENT. 1. **Conspiracy—Facts; Employment Contracts:—**

(a) Brewer's franchise (Ex. 1 attached to the complaint, Ex. 27 in evidence) (29) is the basis of one theory of unlawful conduct. He admits the franchise as genuine with a modification (45) not involved on this point. He testifies that he signed it and believed it "binding and valid" (471). He

had received and read the contract in Oakland, before he came to Oregon (407). Paragraph 31 provides that Brewer shall not solicit or cater to any of the customers of the company whom he had known because of his employment (39). This section and all the franchise, except Section 5, was and has always remained the agreement between the parties without change.

(b) The contract of Rightmire to refrain from competitive service was pled (12) (Ex. 7) and admitted (68). He claims it was written with a partnership (56) but as such it was later assigned to the appellant corporation (Ex. 28) and never denied as a contract between him and appellant. Carl Duncan's contract (Ex. 8) followed the same course.

Customers Service Contracts:—

In addition to the above employment contracts there are admittedly many service contracts with customers in Oregon whom appellant was serving. These were all on "Service Order," a form of contract (Ex. 11). Most were on an annual (Ex. 54), others on a monthly basis (Ex. 55). Others were verbal or "one shot orders" (6). Appellees admittedly knew them, were ordered to serve customers named therein periodically, did so and reported to appellant, but after the conspiracy, served them and reported to Brewer's Pest Control (427-9, 439). In appellees' answer (46-50, 53, 54, 57) all admit taking and serving 142 Paramount accounts in var-

ious parts of the state (301). Actually the number is much greater (64). When appellant promptly on August 1, 1946 called on these accounts, some were already served by Brewer (348) who did not attempt to terminate his contract until July 31, 1946 (16) and whose agreement provided he would not solicit or serve appellant's customers for three years after the termination of his employment (39).

The pest control business initiated, financed and manned by appellant, it endeavored to reestablish after August 1st and found that some former customers preferred to remain with Brewer's Pest Control because it was the personnel and service they previously knew (297, 423). In addition to the 142 admitted accounts, they acquired others until, based on their commercial piracy of appellant's established business, appellees were able to carry on their own.

Appellees knew of appellant's customer contracts as well as the contents thereof because such were brought to their knowledge by virtue of their work for appellant and also by the service of the complaint in the state suit as that action was finally pled (465) which appellees stipulated "involves the same matters involved here" (413). Appellees were willing to go on acquiring Paramount business notwithstanding they knew their acts violated appellant's customer contracts and their own agreements (430, 439). The conspiracy is proven by the above description of what the appellees did.

Individual Participation:—

There were five conspirators: *Duncan* was appellant's field instructor (140). His conduct can be proven as part of the conspiracy. He was employed by appellant since 1942 and being a good teacher (167), he was sent to Oregon to instruct Brewer, by whom he is now employed (140, 463) and with whom he stayed (455). He was a fugitive from process (168, 463), a defendant in the state case, and the trial court refused to continue his case but of its own motion dismissed it without prejudice (467). He, with Mrs. Brewer, made a five cent bet in endeavoring to get another employe to join their conspiracy (357).

Rosalie Brewer is "the family" to whom Brewer referred (165). They own the pest control business together (311, 499). She came to Oregon with her husband, helped him in the office, posted the books (219, 440, 441) set up by the company (209), did office work and answered the phone (341), wrote checks (448), carried on correspondence (450) and, as she expressed it, "helped whenever he needed it" (442). She aided Brewer in falsifying state records regarding the assumed business name (Ex. 45, 46, 47, 48) (18).

Rightmire made the agreement alleged in the complaint (12) (Ex. 7). At first he had little knowledge of the business, was hired by Brewer and Sibert (415) in 1946 as a service man (141). He had good training under Duncan (273, 425-6), was solicited (422) and went to work for and is associated

with Brewer in the same business (426) since August 1, 1947 (291, 565) in eastern, western and southern Oregon and Idaho (424). The same detailed reports and methods he performed for Paramount in connection with their contract accounts prior to August 1, 1947, he now performs for Brewer Pest Control (427-8), in Oregon and Idaho (431) and is paid weekly (423). He admits he is now serving the same customers for Brewer Pest Control and he "solicited all potential business in every town" (433). His and Brewer's names appear on service slips of former Paramount customers as early as the 3rd and 4th of August, 1947 (245).

Merriott was never in the pest control business before he was employed in February, 1947 by Brewer who, contrary to his franchise, did not require him to sign the employees' non-competitive contract (168). He went to work with Rightmire (434) and worked until July 31, 1947 for Paramount (435) and had heard "something" previously of Brewer breaking with Paramount (436). He works for Brewer for a weekly wage (438) and serves the same customers for Brewer as he served for Paramount and solicited new potential business, including those he knew were under contract with Paramount (54, 439).

Brewer had no previous pest control service or knowledge (135) (Ex. 15). He came into the Oakland office and applied for work (142; Ex. 15). He had a short training in California (143, 177), then trained under Duncan in Oregon (140). He inten-

tionally concealed from appellant that he was going into a competitive business (245, 315, 405-6) until the third of August, 1947 (245). He did the following things to take over appellant's business: (a) Though he says somewhere between June (318) and July 25th (501), not later than June he determined to go into his own business. During that time, while concealing his ultimate purpose, he compiled with Hilts the June accounting (Ex. 36) and secured a reduction in payment, and voluntarily made a part payment of $259.61 thereon (Ex. 37. (b) On July 7th, he admittedly (313-5) placed his order for 5000 service contracts, 2000 service orders, 2000 receipts in duplicate, 1500 business cards with the telephone numbers thereon (246) and on July 11th, 2000 statements (325), all delivered July 14, 1947, on forms prepared by Brewer from those used by Paramount (316, 327) and paid for them (Ex. 64-66), then notified Paramount on July 24th he was leaving their service (502, 303, 310-311). (c) He collected outstanding accounts (342), drew $1,017.00 from the bank (236, 384), leaving a $4.00 balance (384). He attempted to prevent company representatives from seeing Rightmire (243), yet testified he made no definite arrangements about going into business for himself until August 1, 1947 (319, 321). (d) Admittedly he and his wife owned Brewer Pest Control business from July 30, 1947 (311). With his wife, not under contract with appellant, he filed a certificate of assumed business name on July 30, 1947 (Ex. 46), falsely asserting

she alone owned the business (496). She did this because Brewer was "busy working" (497, 312). Encouraged in this commercial piracy by the dismissal of the state case, Rosalie Brewer filed a Certificate of Retirement August 27, 1947 (Ex. 47), falsely asserting she had no interest in the business. Concurrently at that time Brewer filed a Certificate of Assumed Business Name (Ex. 48) for business located in his home (344), falsely certifying he was the sole owner (312, 496-7). His excuse for not including his wife's name is "we did not consider it necessary" (312). Their conduct was not only contrary to statute (4 *O. C. L. A.* § 43-501), but a misdemeanor (4 *O. C. L. A.* § 43-507). On July 30, 1947, Brewer and wife said they were going into competitive business for themselves, taking all Paramount employes with them (341) and all employes thereupon left Paramount (248, 341). They were hired by Brewer on August 1, 1947 (169, 291, 320). No one but Brewer gave notice of leaving. To Paramount, it was a "big surprise" (169), "a bombshell in our camp" (241, 345) and Paramount "was dumbfounded" (406), but thought they were the "best of friends" and those relations "were going to continue" (183). Appellees hung up service cards (Ex. 40-b) like Paramount's (Ex. 40-a; 328). Brewer declared they would have Paramount's equipment, stock, experienced personnel and it would be months before the company could regain its status (343). Customers could call Brewer's Pest Control men individually (321).

Overt Acts are too numerous to mention except by classification. They include, but are not confined to solicitation and serving of each one of appellant's contract customers (506, 349), soliciting other employees to join the conspiracy (357), withdrawal of money (342, 385), undenied by Brewer (454), taking equipment and supplies (344) and office records (367) and filing false records (Ex. 46-8).

Damages: To be actionable, a civil conspiracy must cause damage. (See Error No. 4, p. 32 *infra*).

2. **Conspiracy—Law:—**

The above acts are admittedly voluntary. The law presumes each conspirator "intends the ordinary consequences of his voluntary act." *O. C. L. A.* § 2-407 (3). The acts were done "wilfully" because of "a purpose or willingness to commit the acts." *O. C. L. A.* § 23-108. They were done to "* * * vex, annoy or injure another * * *," and were therefore maliciously done (*O. C. L. A.*, § 23-111), and "a malicious and guilty intent" is conclusively presumed "from the deliberate commission of an unlawful act, for the purpose of injuring another." *O. C. L. A.* § 2-406 (2); *Hitchman Coal and Coke Co. v. Mitchell,* 245 U. S. 229.

The employment contracts of Brewer and Rightmire, wherein said employees agree to refrain from either solicitation or competitive service, are admitted as executed and genuine and are legal contracts. They have a reasonable limit of time (three

years) and of space (the State of Oregon) and as such receive legal sanction (17 *C. J. S.* 622, § 240). *Columbia Tent & Awning Co. v. Thiele*, 135 Or. 511. The trial court refused to find Brewer's franchise was "not fair and reasonable" and crossed out appellees' proposed finding to the contrary (76). The question of fairness or reasonableness was only a verbal attack in this case. There was no pleading to that effect. Brewer had for periods of time performed his contract and made payments thereunder (214-222).

This case fits the legal pattern of an unlawful civil conspiracy. It is a combination of five people associated under the assumed business name of Brewer's Pest Control Service who, by the unlawful means of violating or aiding the violation of personal contracts not to solicit or serve appellant's customers, concert their joint and several action not only upon soliciting, procuring and serving former customers of appellant in violation of their personal contracts, but also as third parties solicit, aid or effect the violation of legal contracts of service between appellant and its own customers. No formal agreement is necessary for a conspiracy, a tacit understanding is sufficient, nor is it necessary each conspirator have knowledge of the details or the means to be used, or that the agreement be enforceable *(Alaska SS. Co. v. International Longshoremen's Ass'n.*, 236 Fed. 964, 969), although all these elements are clearly proven herein. The case can be prosecuted without Duncan being served

(Spaulding et al v. Evenson et al, 149 Fed. 913).

The acts of these appellees are not lawful competition, but are to suppress competition by breaking customer contracts and destroying appellant's lawful business *(Spaulding et al v. Evenson et al,* 149 Fed. 913, 919). There is a natural inference which arises from their acts that all was done in furtherance of a common design, but here appellees admit a common design to build up business for Brewer Pest Control by soliciting all potential business *(Calcutt v. Gerig,* 271 Fed. 220, 222). This included appellant's contract customers.

All that is needed to make this conspiracy an actionable one wherein an injunction will issue is (1) the commission of overt acts, necessary to put the conspiracy into effect, and (2) that damage result from the combination or conspiracy *(Nat'l. Fireproofing Co. v. Masons Builders' Ass'n.,* 169 Fed. 259, 265).

Appellees attempt to make some point of their claim that all appellees did not enter this conspiracy on August 1, 1947. The undenied proof is that all entered the combination sometime during August; they did so with knowledge of the contractual relations involved because served with summons and complaint in the state case "the same as here." They also after entry confessedly promoted the common cause. This makes them all liable, irrespective of the actual date of employment *(Jayne v. Loder,* 149 Fed. 21, 30).

Appellees' defense to the charge of unlawful conduct has been confined to the claim that the franchise of Brewer was repudiated by appellant. That defense is hereinafter disproved. But there is other unlawful conduct. Appellees make no defense, but on the contrary, boast they solicited the appellant's customers under contract for service, and admit acquiring at least 142 of such accounts. In such solicitation and service each conspirator was an agent for all, so the act of one was the act of all *(Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 249), and contracts are legal property and entitled to be protected in their enjoyment, and this is true even though the service was for "one shot," or at will *(Hitchman* case, 245 U. S. 229, 251). The pecuniary value of the reasonable probabilities of performance and profit are recognized in law *(Hitchman* case, 245 U. S. 252).

Even if the charge of conspiracy should fail, the unlawful conduct of appellees would entitle appellant to an injunction *(E. L. Husting Co. v. Coca Cola Co.,* 205 Wis. 356).

3. **Alleged Repudiation of Brewer's Contract:—**

In this case there are two kinds of unlawful acts: (1) The breach by the conspirators of their own contracts of *employment,* aided by the non-contracting employees; and (2) the coordinated action of all conspirators to nullify the customers' *service* contracts of appellant.

To appellant's charge of conspiracy against

these appellees intending to break the service contracts between appellant and its many customers, appellees neither plead nor claim any defense. To the contrary, appellees admit taking 142 of their former employer's accounts by their solicitation and service. On this ground alone it would appear that an injunction should issue.

To appellant's charge of conspiracy between former employees violating their own and other employment agreements, there is no defense pled by Rightmire, other than he made his contract with the partnership. He imposes no defense to the fact that Exhibit 28 discloses this contract was assigned by the partnership to the corporation.

To appellant's charge of conspiracy against Brewer to break his franchise agreement, Brewer pleads the simple defense of repudiation in the following language: "* * * because of the plaintiff's repudiation by the plaintiff *(sic)* of the contract as modified, the defendant Charles P. Brewer wrote his notice of resignation as set forth in Paragraph numbered V of the complaint."

(a) The following *facts* disprove any repudiation of the franchise by appellant:

The contract, with the exception of Paragraph 5, was never denied or rendered ineffectual by either party and Section 5 (474) was the only one where a modification as to amount of payment was made. Therefore, the contract as a whole was never repudiated by either party up to the date of Brew-

er's letter on July 24, 1947. President Sibert, Secretary-Treasurer Hilts and Agent Brewer alone (153, 230) met in Portland on June 17, 1947, and went over the books of Brewer's agency (154, 230, 159). Agent Brewer admits at that interview he agreed to carry on the business for the month of July (315). There is no issue but what the franchise was originally in effect (471). Now the only issue is: Was § 5 of the original franchise revived in June, 1947? Brewer admits the franchise was revived in June because he claims that he told Sibert and Hilts he would continue during July (315).

With a $3,000 per month business (147, 154, 230) Agent Brewer had a sufficient profit to go on the franchise. Brewer's own evidence, Ex. 77, (Tr. 82) shows a gross business sales of $33,394.30. Brewer claims that this exhibit was introduced as a means of his borrowing money from The Bank of California, but admits that he never borrowed any money (284). After the June audit, business was on an "even keel" and no mention was made of dissatisfaction (229, 242) nor any mention of terminating Brewer's relationship and no indication from him of any different payment than that which was then agreed upon (231). His franchise was now better for him and it was his suggestion that he go back to it (154, 161, 233). Relations were so friendly (160, 161, 164) that Sibert bought the airplane tickets for Brewer and his daughter to go South to Mrs. Brewer (162), and they stayed at the Sibert home four or five days and left good friends (162).

Brewer's slogan for his business was "The Best in the West" (405, 164). He also admits no modification of this contract nor of any of its terms, except that part of Section 5 which provided for an 80-20% distribution when he wanted a 50-50% division of the profits. In giving Brewer's reason for cancelling his franchise, Brewer says Paramount's refusal to give the 50-50% distribution was the "entire reason—there was no other" (306). Brewer denies many of the foregoing statements, but there are several circumstances which disprove his position and do prove that it was Brewer who repudiated the contract and not appellant. He further admits that when the contract was modified it was not on a 50-50 basis, but on the basis that when Paramount got a dollar, he was to get a dollar (475, 307) and that he was going to pour back into the business what he did not need for himself and the equal payment to Paramount (308).

The circumstances refuting Brewer's claim of appellant's repudiation and establishing Brewer's repudiation are as follows:

(1) If Brewer had notified Paramount in June or July, 1947 as he claims, that he was through with Paramount (315, 452) if they did not give him a 50-50 division of profit and Paramount knew they were not and would not give him such division, *why would Paramount not have prepared to take over the business?* In place of that they were stunned and struggled to get back on their feet (242-249, 377) after Brewer took the bank account, men, supplies and equipment.

(2) Brewer, in spite of his other statements to the contrary, admits he gave no declaration or notice that he was through with Paramount, except his letter of July 24th (Ex. 42), received by Sibert on his vacation (165), when he says, "* * * if I gave them 90 days (notice) they (Paramount) would move in here with a dozen men and take over possession of everything in sight, and I would be left sitting here broke" (308). He says he knew of the 90-day provision and purposely avoided it (308). This same reasoning applies to his claim that he gave such notice in November, 1946 (475) and in March, 1947 (478). The alleged defense of repudiation rests on Brewer's testimony alone. His said claim is in direct contradiction to the testimony of Sibert, Hilts and the circumstances of the case as herein recited. It is presumed that when the law says there must be some testimony to support any proposition, that at least under equitable principles enforceable in a court of conscience, it must be testimony worthy of belief to the extent that the court can with confidence predicate its decision on that testimony.

(3) Since Brewer must take the heavy burden of establishing repudiation and attempts to do so by his testimony alone, it is relevant and material that we inquire into his integrity as disclosed by the facts in this case. The following indicates that he is to be distrusted in his testimony. If any one of the following instances appeal to the court as one in which Brewer falsified his evidence, then under

the statute "a witness false in one part of his testimony is to be distrusted in others." *(O. C. L. A.* § 2-1001 (3)).

Examples of falsification are: (a) Brewer swore he determined to go into business for himself between the 20th and 25th of July, 1947, and that he devoted every minute of his "best efforts to Paramount Pest Control business up to August 1st" (289, 315). Yet the record shows he placed his order for all the above mentioned business supplies on July 7, 1947 (314, 324, 330) and admits if he placed these orders, he would be going into business for himself (315). (b) He claims he did not recognize the franchise after January 1, 1947, yet he delivered three checks bearing that designation as payment thereon (Ex. 30-35) and in another place he says he made them "on the original franchise basis" (490). (c) He claims he bought poison No. 1080 from the Government Department of Fish and Wild Life in August, 1947 (294-297) and the Deputy Agent of the Department says he could not (331-338). (d) He admittedly falsified public records connected with his assumed business name (Ex. 45-48, inc.). (e) He claims he paid for the air trips South in June, 1947, by certain checks (289). This was at the same time he claimed he notified Paramount officers he was quitting (315, 452), but the trip was arranged by Sibert (162, 385), paid by Paramount (385), and one of the three checks he says he used, was for tires (385) and the other drawn after he left Portland (385). (f) He claims

he was practically "forced under duress to sign the franchise in July, 1946" (302), yet stayed on for over a year in what his wife at least described as "friendly" relations down to the time of Brewer's resignation letter of July 24, 1947 (449), yet he had read this contract and had it for two days before he came to work for Paramount (144) on February 2, 1946 (143, 145) and knew of the franchise for six months from February to July, 1946 (145). (g) The undenied statements of appellant's witnesses that Brewer said they were leaving and would be the worst "so-and-so's" in the world as of August 1st, shows they saw themselves through other eyes (341).

(b) The *Law* has certain specific requirements for proof of repudiation: "* * * where one party to a contract refuses to perform except on a material modification or addition of new terms, such conduct amounts to a repudiation." *Jordan v. Madsen et al,* 252 P. 570. It must consist of a present, positive, unequivocal refusal to perform the contract and a mere threat alone to abandon is not repudiation. *Gold Mining and Water Co. v. Swinerton et al,* 23 Cal. (2d) 19. Here the evidence worthy of belief shows decidedly there was a present, positive and unequivocal agreement to continue the franchise on the part of Paramount until Brewer's letter. At no time did appellant make a present, positive and unequivocal refusal to perform as required in *Atkinson v. District Bond Co.,* 5 Cal. App. (2d) 738.

It is reasonable to assume from the evidence that Brewer felt himself firmly enough entrenched to send his letter of July 24, 1947 (16) and to continue to serve Paramount's customers. All this he actually did. The one point on which he miscalculated was his failure to realize his old friends would actually institute legal proceedings against him to protect their business.

Assuming, for the sake of argument only, that Brewer is correct when he claims he was willing to go on with the franchise on a 50-50 split of profits, then such was a conditional renunciation, and renunciation of a contract by the promissor is not effective *unless such repudiation is unequivocally accepted by the promissee.* 17 *Corpus Juris Secundum,* "Contracts," § 472 (3) p. 978. Brewer does not testify that his repudiation was accepted by Paramount and where he repudiated without complying with the contract requirement of 90-day notice, there could be no repudiation by appellant. The requirement of a contract as to notice—as to the time of its giving, its form and the manner of service thereof—must be strictly observed in cancelling the franchise; there must be exact compliance with such provisions. 12 *Am. Jur.* "Contracts," § 448, p. 1030. There was no compliance with the time of notice (163), and Brewer's letter of July 24, 1947 (16) was ineffectual for anything except to act as his own repudiation of the franchise.

Appellees made some contention that they were not all employed as of August 1st and that they re-

ceived simply a weekly wage (423, 438). These matters are entirely immaterial because any person knowingly entering a conspiracy already formed is deemed a party to all acts committed by the other conspirators. Each conspirator, by the service of the complaint in the State case, was made fully aware of the conspiracy. Whether he received a weekly wage or a division of the loot in the rapine of plaintiff's business, is likewise immaterial as long as he damaged appellant thereby. It seems conclusively established that there was a conspiracy in which all the appellees joined. When Brewer did not comply with his contract with respect to notice, he on the 24th of July repudiated his agreement and the others joined in the unlawful purpose to the damage of the appellant.

It seems proven beyond doubt that these appellees combined, if not by specific agreements, then by concerted action, to break their own employment contracts and those service agreements between appellant and its customers. They knew this concerted action would and intended it should cause damage to appellant (341-343). Although this conspiracy was the gravamen of appellant's complaint (13), and an issue between the parties, the trial court made no specific finding or conclusion, or any finding or conclusion on this issue as required by rule. (Rule 52 (a)).

ERROR NO. 3—EQUITABLE REMEDY—INJUNCTION

SPECIFICATION. The trial court erred in not (1) enjoining the appellees' unlawful conspiracy and interference with appellant's contract customers, (2) invoking upon certain individual appellees the prohibitions which they had invited by virtue of their employment contracts (12, 29), and (3) invoking equitable remedies, since damages were inadequate, not capable of determination, and there was necessity for the avoidance of a multiplicity of actions.

POINTS AND AUTHORITIES. Rights to perform contracts and reap the profits therefrom and the right of performance by the other parties thereto, such as appellant's customers, are property rights and entitled to equitable protection. 84 *A. L. R.* 43-100, Note.

Equity will enforce covenants in partial restraint of trade and are upheld by the courts when made by an agent or employe to prevent competition with his principle or employer after the expiration of service when such restrictions are reasonably necessary to protect the employer from business loss. *Donohue v. Peterson,* 161 Or. 65; *Thompson Optical Institute v. Thompson,* 119 Or. 252.

Equity will enjoin when damages are inadequate or uncertain and to avoid a multiplicity of actions. *Bernard v. Willamette Box and Lbr. Co.,* 64 Or. 223; *Roots v. Boring Junction Lbr. Co.,* 50

Or. 298; *Phez Co. v. Salem Fruit Union,* 103 Or. 514.

ARGUMENT. It would be unthinkable if having established the unlawful conduct of these conspirators, the law could afford no remedy to protect a business which had taken so much hard work to establish and which had unique features in poisons and their application as described by appellant's entomologist (184-205). This specification of error describes those remedies and charges the trial court with error in failing to invoke them.

(a) REASONS OF TRIAL COURT REFUTED. Apparently the trial court agreed with appellant in many of the positions it assumed, but denied the remedies and assigned but two reasons for its refusal to invoke them.

1. When this suit was filed October 22, 1947, appellant concurrently moved for a temporary restraining order (41). Promptly after appellees' answers to interrogatories were filed (45-66), a hearing was had November 18th. The court denied the motion "until there is disclosure in more detail of the secret nature of the processes * * *" (66).

The "secret processes" were facts in the case, but immaterial on the matter of issuing an injunction. Where admitted contracts of employment and service were admittedly violated, a court of conscience was entitled to enjoin the unlawful conduct. Such was true whether the business involved secret processes or all its phases were open to the public. The gist of injunctive relief rested in the violation

of valid and existing contracts. Secrecy was no necessary requisite to secure injunctive relief.

2. With the court's assurance of an "early pre-trial and trial date" (66), no appeal was taken from the denial of a temporary injunction. Delay occurred in order to suit the convenience of appellees and a burdened trial court. Pre-trial was had December 26, 1947, and trial on January 20 to 23, 1948, and an opinion rendered on January 30th. It is reasonable to assume the trial court felt the urge for appellant's relief when it said, "I would not think I should enjoin defendant generally from re-engaging in the pest control business; but if this were August, 1947, I would feel that defendant should be restrained from any business with plaintiff's former customers, as Customer Lists are protected by the law" (73). It seems equally apparent that the only reason why the court did not so enjoin appellees was because "Considerable time has gone by and the interest of 140-odd third parties who have continued service with defendants has to be kept in mind. So an injunction will be denied." (73). The actual time after appellant qualified to sue in this state on August 25, 1947 (Ex. 3; 118) and the filing of this suit on the following October 22nd, was fifty-eight days, and was occupied with investigation, preparation of the case and the filing of the pleadings herein. Such was not an unreasonable delay because the violation of appellees was at first slight and later definitely progressive. An analysis of Exhibit 54 shows there were cancellations

of the contracts for one year as follows: 36 in August, 9 in September, 40 in October, and of the 36 cancelled in August, 20 were on or after the 15th. All these customers were under contract with appellant. The trial court's statement that these "140-odd third parties have continued service with the defendant has to be kept in mind" (73), does not take into consideration that said customers violated their contracts undoubtedly at the instigation of appellees, and definitely no court approval should be given the commercial piracy of the appellees or the unlawful breach of contract by illusioned customers.

(b) Contracts Protected by Equity. Even if appellant's employes were under no contractual obligation, the law would prevent a conspiracy to and a breach of appellant's customers' service contracts by appellees. These customer contracts call for a continuing service over a period of time, varying from one to twelve months, with an average of over six months to run. These contracts were appellant's property, gained from active service, experience, time and expense and protected from commercial piracy. The trial court must have overlooked the fact that all these contracts were not broken on August 1st, nor did the activity of the conspirators all appear to appellant as of that date. Appellees could not solicit so many customers on that particular date, but this was an active progressive piracy, continuing for several weeks.

There has been no change in the circumstances

of the parties as would bring this cause within the rule of a lost remedy because of laches. *E. L. Husting Co. v. Coca Cola Co.,* 205 Wis. 356, 371.

Rights in customers and employees contracts were property from which the appellant was entitled to receive its profits. That principle is well established. Appellant does not here elaborate upon the authorities. The note in 84 *A. L. R.* p. 43 *et seq.,* contains a list of federal and state authorities, as well as of England. It is so complete in its declaration of support for the relief here sought, that to reiterate the authorities or their holdings would occupy unnecessary space in this brief devoted to particular issues also presented at the trial.

ERROR NO. 4—LEGAL REMEDY—DAMAGES

Specification. The trial court erred in failing to award appellant a monetary judgment upon certain specific proven contract obligations against Brewer and certain specific items of damage against all appellees.

Points and Authorities. Compensatory damages may be recovered. *Nalle v. Oyster,* 230 U. S. 165; *E. L. Husting Co. v. Coca Cola Co.,* 205 Wis. 356; 1 *Sutherland* "Damages," 4th Ed. § 78, p. 283; 11 *Am. Jur.* "Conspiracy," § 57, p. 587.

In Oregon the rate of interest is 6% on all monies after the same become due. *O. C. L. A.* § 66-101.

All conspirators may be joined as particular de-

fendants in an action for damages caused by their unlawful acts. *Clein et al v. City of Atlanta et al,* 164 Ga. 529; 11 *Am. Jur.* "Conspiracy," §§ 53, 54, p. 584. The liability is joint and several. *Lynes v. Standard Oil Co. et al,* 300 Fed. 812; *Fountain Spring Park Co. v. Roberts et al,* 92 Wis. 345. Interest is the ordinary incident for non-payment of obligations and compensation is a fundamental principle of damages. *Prager v. N. J. Fidelity and Plate Glass Ins. Co.,* 245 N. Y. 1. Interest must be allowed as an incident to "just compensation" where property has been taken. *United States v. Rogers,* 255 U. S. 163; *Prager v. N. J. Fidelity & Plate Glass Ins. Co. (supra.)*

Argument. In addition to injunctive relief, appellant asked for a monetary judgment on the basis of contract obligations from Brewer and damages in tort from all appellees.

1. Contract Obligations: The following sums are due under Brewer's contracts:

(a) On June 17, 1947, Sibert, Hilts and Brewer met in Portland (158, 159, 230). They agreed upon an accounting running from July 1, 1946 to June 30, 1947 (231). Brewer's books (159-160) showed he had over $3,000 per month business and could keep his franchise, pay his bills, operate his territory and have $855.00 per month for himself. He concluded, and it was his own suggestion that he go on the franchise (161). It was also Brewer's suggestion that they extend the "dollar for dollar" basis

for the fiscal year above mentioned (238). Hilts prepared a statement (Ex. 36) (230, 236, 237, 241, 242) on that basis. Brewer helped make this compilation. The figures were from his books and Hilts explained the method of making the accounting (230-242). Brewer agreed the amount due was $3,359.61, of which he paid $259.61 on July 9, 1947 (Ex. 36, 37, 38) (242). He entered this payment on the accounting in his own handwriting (242, 310; Ex. 36).

The balance of $3,100.00 Brewer promised to pay (241), but never paid (373) and demand was made therefor (Ex. 56). He admits between $2,500 and $3,000 was due (460). In the last few moments of trial he offered an accounting, conceding that there "might be a mistake some place" in this accounting (460). Appellant made objections thereto which were sustained (465). This $3,100 is definitely due.

(b) The next contract obligation is for $478.15 under the original franchise for the month of July 1947 (Ex. 39). After the June accounting (Ex. 36) Brewer wanted to and agreed to go back on the franchise payments (161, 233, 261). He admits he was to carry the business during the month of July (500, 318). The amount for distribution was $2,390.75 and the 20% due the company was $478.15 (392). Brewer does not question the amount.

(c) There is the amount of $973.30 (Ex. 50) due on fixed assets not turned in as per contract (305).

(d) There is a claim of $925.89 for unsupported expenditures (Ex. 51; 375) and no effort was made by Brewer to support these items that he claims were for business, by voucher or supporting evidence (375, 392). He admits their withdrawal and alleges they were "for business," but does not say whose business (475).

(e) The sum of $678.50 (Ex. 51 (a)) was for one-half of the income derived from the Eastern Oregon run for business for the months of February, March and April, 1947 (376). Brewer asked for this help and the agreement was that Paramount would send men into Eastern Oregon, pay their expenses, get more business, and Brewer and Paramount would share the profit or loss and expenses (150-2). Paramount paid the expenses and Brewer collected and kept the profits. The expense is included in Ex. 36 and said sum is due from the profits (376).

2. Tort Obligations: The following sums are due jointly and severally from the appellees:

(a) Appellant's business is a personal service, built on organization and experienced men and poisons and inert igredients (377 *et seq*). When Brewer Pest Control made the coup to take all Oregon business, appellant sent men from other localities into Oregon to try and save it. Exhibit 53 is a statement of $3,596.95 paid to these men (379) and is an expense allocated solely to salvage operations caused by appellees' conduct. Appellee's cross-examination

to the effect that this included Paramount's employees at regular salary (393, 394) is immaterial. But for appellee's conduct, these men would have been engaged in their regular duties.

(b) Exhibit 54 represents contracts, which were all on Paramount's form (Ex. 11), of customers having an original term of a year or some part thereof yet to run, which customers appellees caused to desert appellant and do business with appellees. This amount of $4,596.75 represents the total sum of money that they would have received out of this business and the amount that appellant would have received on the franchise basis is $2,849.99 (382) which is claimed here as actual damage and which appellant would have received but for appellee's interference (380-384).

(c) Exhibit 55 represents contracts like those in Exhibit 54 but wherein the original term had expired and they were operating on a monthly basis under the contract terms. The total of earnings from these monthly contracts amounted to $566.50 (Ex. 55) (383) and Paramount's share was $351.00 (382). Exhibits 54 and 55 represent 185 accounts taken by appellees who confess taking 142 thereof (391, 47). All these cancellations were, by appellant's officers, carefully segregated and those due to Brewer Pest Control listed (395).

3. Law. Since appellant has an exclusive right in Oregon to service its contract customers with its equipment and poisons and by its methods, it is

entitled to injunctive relief against the breach of its express and implied negative covenants and against service of its customers by former employes *(E. L. Husting Co. v. Coca Cola Co. et al,* 205 Wis. 356).

But in addition, these appellees have maliciously induced appellant's former customers to breach their contracts of service. They are therefore jointly and severally liable *(Lynes v. Standard Oil Corp. et al,* 300 Fed. 812, 815) for damages resulting from the breach.

Under the above authorities, damages are recoverable on a compensatory basis and all conspirators are jointly and severally liable for whatever damage their conspiracy caused in an amount that will compensate the appellant. The legal rate of interest in Oregon is 6% and interest is allowable on damages when the amount is so definite and certain that the court can say that appellant lost the use of that money for which interest is to compensate. Such interest is acknowledged on all items in accordance with the exhibits evidencing the obligations and the date from which they were due.

In Conclusion, appellant has shown it brought to Oregon, a business to better public health and welfare and established it by personal sacrifice, great labor and much money. It sought to protect its investment by contracts with both employes and customers. As employes, appellees occupied a

unique position because they were the only personnel known to the customer who paid direct to appellees for their service.

Obviously goaded by avarice, the employes became disloyal, ignored the contracts, and sought and acquired a very substantial part of appellant's Oregon business. Appellant asks this court to prevent the continuance of this wrong and compensate for injury done. "A faithful man shall abound with blessings, but he that maketh haste to be rich shall not be innocent."

Respectfully submitted,

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